

Commodity Futures Trading Commission

§ 35.2

this paragraph (b)(2)(vi)(A) of this section or by an entity referred to in paragraph (b)(2) (i), (ii), (iii), (iv), (v), (vi) or (viii) of this section; or (C) which has a net worth of \$1,000,000 and enters into the swap agreement in connection with the conduct of its business; or which has a net worth of \$1,000,000 and enters into the swap agreement to manage the risk of an asset or liability owned or incurred in the conduct of its business or reasonably likely to be owned or incurred in the conduct of its business;

(vii) An employee benefit plan subject to the Employee Retirement Income Security Act of 1974 or a foreign person performing a similar role or function subject as such to foreign regulation with total assets exceeding \$5,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80a-1 *et seq.*), or a commodity trading adviser subject to regulation under the Act;

(viii) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing;

(ix) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or a foreign person performing a similar role or function subject as such to foreign regulation, acting on its own behalf or on behalf of another eligible swap participant: *Provided, however,* That if such broker-dealer is a natural person or proprietorship, the broker-dealer must also meet the requirements of either paragraph (b)(2) (vi) or (xi) of this section;

(x) A futures commission merchant, floor broker, or floor trader subject to regulation under the Act or a foreign person performing a similar role or function subject as such to foreign regulation, acting on its own behalf or on behalf of another eligible swap participant: *Provided, however,* that if such futures commission merchant, floor broker, or floor trader is a natural person or proprietorship, the futures commission merchant, floor broker, or

floor trader must also meet the requirements of paragraph (b)(2) (vi) or (xi) of this section; or

(xi) Any natural person with total assets exceeding at least \$10,000,000.

§ 35.2 Exemption.

A swap agreement is exempt from all provisions of the Act and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to such agreement, is exempt for such activity from all provisions of the Act (except in each case the provisions of sections 2(a)(1)(B), 4b, and 4c of the Act and § 32.9 of this chapter as adopted under section 4c(b) of the Act, and the provisions of sections 6(c) and 9(a)(2) of the Act to the extent these provisions prohibit manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market), provided the following terms and conditions are met:

(a) The swap agreement is entered into solely between eligible swap participants at the time such persons enter into the swap agreement;

(b) The swap agreement is not part of a fungible class of agreements that are standardized as to their material economic terms;

(c) The creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms of the swap agreement; and

(d) The swap agreement is not entered into and traded on or through a multilateral transaction execution facility;

Provided, however, That paragraphs (b) and (d) of Rule 35.2 shall not be deemed to preclude arrangements or facilities between parties to swap agreements, that provide for netting of payment obligations resulting from such swap agreements nor shall these subsections be deemed to preclude arrangements or facilities among parties to swap agreements, that provide for netting of payments resulting from such swap agreements; *Provided further,* That any person may apply to the Commission for

exemption from any of the provisions of the Act (except 2(a)(1)(B)) for other arrangements or facilities, on such terms and conditions as the Commission deems appropriate, including but not limited thereto, the applicability of other regulatory regimes.

PART 36—EXEMPT MARKETS

Sec.

36.1 Scope.

36.2 Exempt boards of trade.

36.3 Exempt commercial markets.

AUTHORITY: 7 U.S.C. 2, 5, 6, 6c, and 12a, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

SOURCE: 66 FR 42270, Aug. 10, 2001, unless otherwise noted.

§ 36.1 Scope.

The provisions of this part apply to any board of trade or electronic trading facility eligible for exemption under sections 5d and 2(h)(3) through (5) of the Act, respectively.

§ 36.2 Exempt boards of trade.

(a) *Eligible commodities.* Commodities eligible under section 5d(b)(1) of the Act to be traded by an exempt board of trade are:

(1) Commodities having—

(i) A nearly inexhaustible deliverable supply;

(ii) A deliverable supply that is sufficiently large, and a cash market sufficiently liquid, to render any contract traded on the commodity highly unlikely to be susceptible to the threat of manipulation; or

(iii) No cash market.

(2) The commodities that meet the criteria of paragraph (a)(1) of this section are:

(i) The commodities defined in section 1a(13) of the Act as “excluded commodities” (other than a security, including any group or index thereof or any interest in, or based on the value of, any security or group or index of securities); and

(ii) Such other commodity or commodities as the Commission may determine by rule, regulation or order.

(b) *Notification.* Boards of trade operating under section 5d of the Act as exempt boards of trade shall so notify the

Commission. This notification shall be filed with the Secretary of the Commission at its Washington, DC headquarters, in either electronic or hard copy form, shall be labeled as “Notification of Operation as Exempt Board of Trade,” and shall include:

(1) The name and address of the exempt board of trade; and

(2) The name and telephone number of a contact person.

(c) *Additional requirements.* (1) A board of trade notifying the Commission that it meets the criteria of section 5d of the Act and elects to operate as an exempt board of trade shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(2) If the Commission finds by order, after notice and an opportunity for a hearing through submission of written data, views and arguments, that the facility serves as a significant source for the discovery of prices in the cash market for the underlying commodity, the facility must on a daily basis disseminate publicly trading volume, opening and closing price ranges, open interest and other trading data to the extent appropriate to that market with respect to transactions executed in reliance on the exemption as specified in the order.

§ 36.3 Exempt commercial markets.

(a) *Notification.* An electronic trading facility relying upon the exemption in section 2(h)(3) of the Act shall notify the Commission of its intention to do so. This notification, and subsequent notification of any material changes in the information initially provided, shall be filed with the Secretary of the Commission at its Washington, DC headquarters, in either electronic or hard copy form, shall be labeled as “Notification of Operation as Exempt Commercial Market,” and shall include the information and certifications specified in section 2(h)(5)(A) of the Act.

(b) *Required information.* (1) A facility operating in reliance on the exemption in section 2(h)(3) of the Act, initially and on an on-going basis, must:

(i) Provide the Commission with access to the facility’s trading protocols and electronic access to transactions